ment. It is also important to note that he went to U.K. alone without being accompanied by any relative, as would be expected in serious illness of that nature. There was no question of financial hardship since he was a very well-to-do man.

The making of wills and gifts is encouraged by the Holy Quran and the Sunnah of the Holy Prophet, the two principal laws of the Shariah. We noted that the deceased was a devout Muslim in his lifetime, having contributed the annual payment of zakat to the State Government of his property and income. We would accept the submission relating to the observation of the deceased by Dr. Merican, who had been treating him for a long time and who admitted in evidence of being a cancer patient himself, that the deceased was a strong-willed and intensely practical man and appeared to be calm in his illness. He wanted to put his affairs in order and was keen to go for treatment as soon as possible.

On his return from U.K., he still continued to manage the running of the match factory which was not far from his house, he was able to carry out the pursuit of ordinary avocations and there was no evidence to indicate that he was unable to perform his prayers five times a day or compelled to do so while sitting down instead of standing in the ordinary way. On the contrary, the evidence pointed to his ability to carry out all the normal functions until only about five weeks before his death that he became bedridden. He passed away about seven months after making the gifts. During that period, apart from what has been said earlier, he had also written letters to friends overseas well indicating his belief of recovery. That, in our view, tends to lessen his apprehension of immediate fatality. On December 29, 1966, he wrote a reply letter to Mr. Matsumara of Japan informing him of his illness and of his intention to visit Japan as soon as he felt strong again. Both had common interest in running match factories and the deceased's intention to visit Japan was to see the new machines at work. Later in February 1967 and March 6, 1967, he wrote letters to the Danish Ambassador regarding the repairs to his house in Kuala Lumpur which appeared to be occupied by the Ambassador as tenant informing the latter that repairs would be carried out.

Taking the above into consideration, we are satisfied that the deceased was not under the apprehension of imminent death at the time he made the gifts to his four children, that the illness did not incapacitate him for the pursuit of his ordinary avocations and that although the illness continued for less than a year, the facts and circumstances as discussed above form sufficient length of time to remove or lessen from his mind the apprehension of immediate death.

In the circumstances, we allow the appeal with costs and set aside the judgment of the learned trial Judge. We hold that the gift by transfer of the 298 shares of the match factory to the four appellants was not caught by the doctrine of *Marz-ul-Maut* and is therefore valid under the Shariah laws according to the principles set out at the beginning of this judgment. We are satisfied that the three conditions required to validate a lawful gift made during the lifetime of the deceased are complied with.

The appellants are entitled to costs here and the Court below.

The deposits are to be returned to the appellants.

Appeal allowed.

Solicitors: *Wrigglesworth & Co.; Zain & Co.; C.H. Liew & Co.*

CHAN FOO MENG & 68 ORS. v. HUP SENG CO. LTD.

[O.C.J. (Mohamed Dzaiddin J.C.) March 24, 1981]

[Kuala Lumpur – Civil Suit No. 681 of 1963]

Contract – Sale and purchase of land – Whether defendant company purchased land as trustees of plaintiffs.

In this case the plaintiffs sought a declaration that the defendants are their trustees in respect of a piece of land ("the land") Lot 1995 held under Selangor Certificate of Title No. 13415, in the Mukim of Petaling, District of Kuala Lumpur. The plaintiffs alleged that the land was purchased by them under an agreement dated May 16, 1959, and should be subdivided accordingly. They asked the Court to order the defendants to execute and register a transfer of the land in favour of the plaintiffs. Alternatively, they sought a vesting order. All the original 69 plaintiffs lived on the land and paid ground rent for their respective plots to the registered proprietor, one Mrs. Brown, who decided to sell the land to these tenants. The price agreed between the tenants and her for the remaining portion of the land consisting of an area of 29 acres and 15 poles ("the remaining portion") was $58,000.00. On April 18, 1958, a sale agreement was executed between

Mrs. Brown and Tai Wah and four others on behalf of all the purchasers. She later transferred the remaining portion to Tai Wah and three others, who later transferred the remaining portion to the defendants in 1960, for the consideration of $58,000.00 which would be satisfied by the allotment to these four persons and all their nominees of 58,000 fully paid-up shares in the capital of the defendant Company to which each of the four named persons was to receive 14,500 fully paid-up shares. The four persons requested the defendant Company in writing to allot to the persons named in the said notices the shares of the Company.

Held, dismissing the plaintiffs' claim with costs: the plaintiffs have failed to prove that the defendant Company is their trustee. Clearly, the defendant Company purchased the land from the four persons as purchasers and not as trustees.

Cases referred to:

(1) *Hup Seng Company Ltd.* v. *Chin Yin & Ors.* [1962] M.L.J. 371, 372.
(2) *Short* v. *Treasury Commissioners* [1948] 1 K.B. 116, 122; [1948] A.C. 534, 545.
(3) *Macaria* v. *Northern Assurance Co. Ltd.* [1925] A.C. 619.
(4) *E.B.M. Co. Ltd.* v. *Dominion Bank* [1937] 3 All E.R. 555.

CIVIL SUIT.

Dato Morris Edgar for the plaintiffs.
Wong Chong Wah for the defendants.

Cur. Adv. Vult.

Mohamed Dzaiddin J.C.: In this case the plaintiffs are seeking a declaration that the defendants are trustees of the plaintiffs of a piece of land held under Selangor Certificate of Title No. 13415 for Lot 1995 in the Mukim of Petaling in the District of Kuala Lumpur.

By their amended Statement of Claim the plaintiffs alleged that the said property was purchased by them under an agreement dated May 16, 1959, AB 6 and should be subdivided in the manner mentioned in the correspondences exhibited as AB 1, AB 2 and AB 3. Consequently they are asking the Court to order the defendant Company to execute and register a valid and registrable transfer of the land in the names of the plaintiffs or alternatively for a vesting order.

Originally, there were 69 plaintiffs but were subsequently reduced to 15 at the trial.

The facts of the case are as follows. All the original 69 plaintiffs live on the said land and paying ground rent on their respective plots to the registered proprietor, one Williamina Anna Harrist Brown. In 1958, desiring to leave the country she decided to sell the said land to these tenants including the trustees of Yik Min School. The price agreed between the tenants and the proprietor for the remaining portion of the said land consisting of an area of 29 acres and 15 poles (hereinafter referred to as "the remaining portion") was $58,000/–. On April 18, 1958, a sale agreement was executed between Mrs. Brown and Tai Wah, Chin Yin, Chin Yoon Wood, Thong Seong Choon and Chin Hon on behalf of all the purchasers. This agreement is mentioned in the agreement in Exhibit AB 6. It was a term of the said agreement that the vendor undertook to subdivide the said land into two lots, one for the School and the other, the remaining portion and to obtain the issue of a separate Issue Document of Title to be registered in the individual names of the purchasers. Subsequently the remaining portion was transferred by Mrs. Brown to Tai Wah, Chin Yin, Chin Yoon Wood and Chin Hon.

In the meantime, on July 28, 1960, the defendant Company was incorporated with a nominal share capital of $75,000/– divided into 75,000 shares of $1/– each. The object of this Company was to acquire the remaining portion by entering into an agreement with the four named persons who were then the registered proprietors. The purchase agreement was entered into by the four named persons and the defendant Company on September 9, 1960. On October 20, 1960, the remaining portion was registered in the name of defendant Company. The consideration for the sale was the sum of $58,000/– which should be paid and satisfied by the allotment to the four named persons and all their nominees of 58,000 fully paid-up ordinary shares in the capital of the Company to which each of the four named persons was to receive 14,500 fully paid-up shares.

On the same date all the four named persons wrote to the defendant Company requesting the defendant Company to allot to the persons named in the said notices the shares of the Company.

Some of the plaintiffs gave evidence. From the evidence, I formed the view that they were not happy with the allotment of shares in return for the money which they said was the purchase price of the land. They said that the original idea was that after the purchase, the land was to be subdivided among themselves and each tenant was to get a separate title to the portion which he occu-

pied. This evidence is supported by the three letters referred to and exhibited as AB 1, AB 2, and AB 3. The original intention to give them separate titles was also confirmed by Mrs. Coles (P.W.2), the daughter of the original proprietor, Mrs. Brown. The plaintiffs also testified that the four named persons to whom the land was transferred in the first instance were trustees for themselves and the other purchasers. There was no mandate by the subscribers that the defendant Company should be formed and that the land should be transferred by the four named persons to the defendant Company. Under cross-examination, both P.W.1 and P.W.3 who are among the purchasers even denied that they were shareholders of the Company. P.W.1 also stated that only during the trial that he knew the trustees had transferred the land to the defendant Company in exchange for their shares.

Having listened to the plaintiff's evidence, I share the view of Suffian J. (as he then was) in *Hup Seng Company Ltd.* v. *Chin Yin & Ors.*[1] when he stated:

"Most of the trouble here arose in my view out of misunderstanding. All the persons involved are uneducated and are unfamiliar with the intricacies of Company Law; and the vast majority of them are frugal Chinese who, I suspect, are highly suspicious of each other. None of the directors of the Company who gave evidence denied that it was the intention of the Company to look after the interest of the persons who had subscribed to pay the purchase price. Be that as it may, some of the subscribers feared for the safety of their money and of their interests in the land."

The defence called the Secretary of the defendants merely to produce a certified true copy of the Company's Memorandum and Articles of Association, copies of the agreements which I have referred to above and also the register of members of the Company. According to the Secretary's record both P.W.1 and P.W.3 were allotted shares in the defendant Company, P.W.1 having 930 shares and P.W.3 450 shares.

In my judgment, the plaintiffs have failed to prove that the defendant Company are the trustees of the plaintiffs. Clearly, the defendant Company purchased the said land from the four named persons as purchasers and not as trustees. It is a direct sale. On the other hand, the plaintiff as admitted by the defence, are shareholders of the defendant Company. It follows that their right as shareholders is something different from being part owners of the undertaking. "The undertaking is something different from the totality of the shareholders." *Short* v. *Treasury Commissioners,*[2] Evershed L.J. p.122. The right of the shareholders is succinctly explained by Lord Porter in *Short's* case in the House of Lords at p.545 where he said:

"In the case of land the owner possessed a tangible asset whereas a shareholder has no direct share in the assets of a Company, he has such rights as the Memorandum and Articles given him and nothing more."

In *Macaura* v. *Northern Assurance Co. Ltd.*[3] it was held that the sole shareholder in a Company, who was also its main creditor, had no insurable interest in the property of the Company. Lord Buckmaster said, *ibid,* 626:

"Now, no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the Company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up."

In *E.B.M. Co. Ltd.* v. *Dominion Bank*[4] Lord Russell, giving the advice of the Privy Council, rejected the suggestion that the assets of a company might in substance be regarded as the assets of the three individuals who constituted its main shareholders. He said that it was "of supreme importance that the distinction should be clearly marked, observed and maintained between an incorporated company's legal entity and its actions, assets, rights and liabilities on the one hand, and the individual shareholders and their actions, assets, rights and liabilities on the other hand."

The defendant also raised the question of indefeasibility of title as pleaded in paragraph 4 of the defence. To my mind the law on this point is very clear. Section 340 of the National Land Code expressly provides that the title of a person registered as proprietor of any land shall be indefeasible. The only exceptions are where there has been fraud, misrepresentation, forgery or an *ultra vires* acquisition purporting to have been made under statutory authority. In my view, none of these exceptions apply to this case.

I therefore dismiss the plaintiffs' claim with costs.

Claim dismissed.

Solicitors: *Dato' Morris Edgar & Clough Thuraisingham; Skrine & Co.*